

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY MICHAEL KELLY,

Appellant.

No. 35786-1-II

UNPUBLISHED OPINION

Bridgewater, J. — Timothy Michael Kelly appeals from a jury conviction of two counts of first degree burglary, three counts of theft of a firearm, two counts on first degree theft, and two counts of first degree unlawful possession of a firearm. The State concedes that the trial court erroneously imposed an exceptional sentence. We affirm the convictions but remand for resentencing under the proper version of the Sentencing Reform Act (SRA), chapter 9.94A RCW.

**FACTS**

On September 3, 2003, the Pierce County Sheriff's Department conducted a security check of Norman and Katherine Lykkens' residence. The local power company had notified law enforcement officers that someone had broken into the house. The deputy observed that the back door had been shattered, and broken glass covered the entryway floor. Inside, the house was in disarray. Things were strewn about, the alarm panel was on the floor, and it appeared that someone had broken a pair of scissors by jabbing them into the wallboard near the alarm panel. The deputy suspected that someone had used the scissors to disarm the alarm.

Behind the house was a blue Honda with its back hatch open and its light flashing slowly,

as though the battery was run down. A license plate lay on the ground near the Honda. That license plate was registered to Andretti Niccolocci.

Because the Lykkens were not home, the deputy made a cursory security inspection of the premises and secured the residence. The Lykkens had been vacationing at a recreational vehicle (RV) park owned by Leisure Time Resorts.<sup>1</sup> Their reservation at the Leisure Time property was from August 27, 2003 through the following week; however, they cut their vacation short because of the news that their house had been burglarized.

When the Lykkens arrived home on September 3 or 4, they inventoried their residence. The intruder had taken many items, including jewelry, two rifles in good working order, ammunition, a Saturn car valued at \$6,500, and a GMC truck valued at \$6,000. The total value of the stolen items was over \$20,000.

Ruston Police officers recovered the Lykkens' Saturn a few days after the authorities discovered the burglary. Niccolocci and another person were arrested in the vehicle. When the Lykkens picked the car up, they noticed what appeared to be blood on the driver's side visor and the steering column. Also, they discovered a Toshiba laptop computer and a black leather jacket in the trunk that did not belong to them. The Lykkens' GMC truck was recovered about three months later in fair condition.

On September 22, 2003, the deputy returned to the Lykkens' residence after the Saturn was recovered. He noticed what appeared to be blood on the driver's side visor and the steering column of the Saturn. He also found what appeared to be blood on the interior light switch in the Lykkens' garage and on a pair of scissors.

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<sup>1</sup> Leisure Time is a part of a larger RV resort company called Thousand Trails Corporation.

A forensic officer took photographs and collected the scissors for analysis. The officer did not collect the light switch plate, the visor, or the steering column for analysis. He dusted for fingerprints in the Lykkens' garage, but he did not recover any. The Washington State Patrol Crime Lab later conducted DNA analysis on the blood from the scissors and it determined that it matched Kelly's deoxyribonucleic acid (DNA).

Meanwhile, on September 5, 2003, a Gig Harbor police officer responded to a suspicious person report. Around midnight on the previous night, a young man knocked on Jack Merritt's door. That young man, later identified as Kevin Spalding, asked Merritt for directions to 7855 Greyhawk. Merritt noticed a second person standing in the street, but he could not clearly identify that second person. Merritt directed the two men to 7855 Greyhawk, the home of Samuel and Carol Eva. The next morning, Merritt became concerned and reported the incident to the police.

When an officer checked the Evas' residence, he noticed that someone had pried off a window screen and had ransacked the inside of the house. He observed that someone had unscrewed the motion-activated lights. The officer dusted for fingerprints at the point of entry, but he was unable to recover any prints. He suspected that the burglars may have been wearing gloves.

The Evas were vacationing at a Leisure Time property near the Canadian border but they cut their vacation short after a neighbor informed them that their home had been burglarized. When they arrived home on September 5, they compiled a list of stolen items and provided it to the police. The list included the Evas' minivan valued at \$15,000, a .45 caliber automatic pistol valued at \$1,400, personal checks, credit cards, a Toshiba laptop computer valued at \$2,200 and

IBM laptop computer valued at \$1,500, a monitor valued at \$400, a black leather coat, jewelry, birth certificates, and various other items. Eva estimated the total value of the stolen property that was never recovered was \$8,000.

As the Evas cleaned up their home, they discovered a piece of paper in their bedroom. The paper contained various names, address, and dates. Included on the list was the Evas' name, address, and their Leisure Time reservation dates. The Evas gave this list to Gig Harbor Police Department responding officer. They also informed Detective Busey that shortly after the burglary, someone had fraudulently cashed one of their stolen checks and that someone had fraudulently used one of their stolen credit cards at a 7-Eleven convenience store. The 7-Eleven's video surveillance captured a person using the Evas' credit card at 9:40 am on September 5, 2003.

On September 8, Detective Busey learned that the Evas' Toshiba laptop and black leather jacket had been recovered from the Lykkens' Saturn.<sup>2</sup> Then on September 11, law enforcement officers recovered the Evas' van in Tacoma. Catherine Milton was in possession of the van at the time. Based on information he obtained from Milton, Detective Busey obtained a search warrant for Julie Grubisa's house. Grubisa is Kelly's aunt. While executing the search warrant, Detective Busey searched a room where Kelly kept his belongings. There, he discovered a handwritten note with the words "Leisure Time" and "Misty at work" with a telephone number. 6 RP at 409.

Misty Saldana-Williams was one of several people at Grubisa's house when Detective

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<sup>2</sup> Several months after the burglary, the Lykkens sold the Saturn to a third party. After the purchase, the third party was cleaning the car and discovered the Evas' pistol under the driver's side dashboard. The third party promptly notified law enforcement authorities.

Busey executed the search warrant. She discreetly told the detective that she was unwilling to speak with him there but that she would speak with him in another location. Detective Busey arrested Saldana-Williams on an outstanding warrant and took her to the police station for questioning.<sup>3</sup>

Saldana-Williams told Detective Busey that she had met Kelly on August 28, 2003, at the Pierce County Drug Court, where they both were supporting a mutual friend. After the hearing, Saldana-Williams and Kelly spent the day together. They ran errands, which included obtaining crystal methamphetamine. That night, they stayed at a Tacoma motel and injected crystal methamphetamine. The next day, Saldana-Williams and Kelly went to Grubisa's house and injected more drugs. Saldana-Williams stayed at Grubisa's house until August 30, 2003, when she had to return to Snoqualmie, Washington, for work. For the following two-week period, Saldana-Williams went to Grubisa's house on her days off from work.

According to Saldana-Williams, Kelly did not stay at Grubisa's house during this period, but he sporadically visited. When he was there, he injected Saldana-Williams with more drugs. Saldana-Williams's memory was admittedly imprecise because she was consistently high on crystal methamphetamine during that two-week period. In addition, or perhaps as a result, Saldana-Williams did not sleep during that period.

At some point during the first night, Kelly asked about Saldana-Williams's job. She worked as a ranger at an RV park Leisure Time Resorts owned. She explained the reservation

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<sup>3</sup> Before Kelly's trial, Saldana-Williams pleaded guilty to residential burglary for her role in the Eva and Lykken burglaries. As part of her plea agreement, the State agreed to reduce her residential burglary conviction to rendering criminal assistance if she testified truthfully at Kelly's trial.

process to Kelly in general terms and noted that she had access to Leisure Time's reservation system. The reservation database contained personal information, such as names, addresses, and vacation dates for all individuals who made reservations with any of the nationwide Leisure Time Resort locations.

Kelly asked Saldana-Williams to compile a list based on information from the Leisure Time's reservation database. He wanted the names, addresses, and reservation dates for people who lived in Gig Harbor. When Saldana-Williams returned to work, on either September 1 or 2, 2003, she compiled the list of four or five Leisure Time members from Gig Harbor. She gave it to Kelly the next time she saw him, sometime between September 3 and 5, 2003. Kelly later asked Saldana-Williams to compile a list with additional addresses and vacation times. She said that she would, but she stalled and never compiled a second list.

On September 18, 2003, Detective Busey interviewed Kelly. During the interview, Kelly admitted that he was the person in the 7-Eleven surveillance photographs, but he denied using a stolen credit card. He insisted that he was using a credit card that a friend had given to him. Also during the interview, Kelly acknowledged that he knew Milton, Saldana-Williams, Spaulding, and Niccolocci. Finally, Detective Busey showed Kelly the list that the officers discovered during the execution of the search warrant. According to the detective, Kelly's demeanor immediately changed and he said, "Where did you get that?" 6 RP at 437-38. When Detective Busey asked further, Kelly said that he did not know what the list was and that he had never seen it before.

On March 9, 2005, the State charged Kelly with one count of first degree burglary, one count of theft of a firearm, two counts of first degree trafficking in stolen property, three counts of first degree theft, one count of residential burglary, and one count of first degree unlawful

possession of a firearm. The State then filed an amended information on April 4, 2006, correcting Kelly's name and date of birth. Then, on June 7, 2006, the State filed a second amended information to amend the charging dates. With respect to the Eva burglary, the State alleged that count III occurred between September 5, 2003 and September 11, 2003; and that count VI occurred between September 5, 2003 and September 6, 2003. With respect to the Lykken burglary, the State alleged that count V occurred between August 28, 2003 and September 5, 2003; and that counts VII and VIII occurred between August 28, 2003 and September 4, 2003. In addition, the June 7, 2006 amended information added three additional counts relating to the Lykken burglary, counts XIV, XV, and XVI, each of which the State alleged occurred between August 28, 2003 and September 5, 2003.

On October 26, 2006, at the beginning of Kelly's trial, the State orally moved to dismiss counts III and VI without prejudice. The trial court granted the motion. On November 6, 2006, at the end of its case, the State filed a second amended information, in which it omitted counts III and VI and changed the charging dates on counts V, XIV, XV, and XVI from between August 28, 2003 and September 5, 2003 to between August 28, 2003 and September 4, 2003. As a result, all counts relating to the Eva burglary had a charging date of September 5, 2003, and all counts relating to the Lykken burglary had a charging date between August 28, 2003 and September 4, 2003.

The jury convicted Kelly as charged. In a December 14, 2006 hearing, the court sentenced Kelly to a total of 327 months, which consisted of a 120-month exceptional sentence on count I to run consecutive to the 87 months imposed on count V, and consecutive to the 60 months flat time on the firearm enhancements on counts I and V. On all other counts, the

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sentencing court imposed standard range sentences to run concurrent with each other.

## ANALYSIS

### I. Ineffective Assistance of Counsel

Kelly contends that he received ineffective assistance of counsel because his counsel failed to object to (a) testimony regarding alleged drug use, drug purchases, and alleged drug culture; (b) evidence regarding the type of precautions that skilled burglars used; and (c) testimony suggesting he had an improper relationship with an older man.

We begin an ineffective assistance of counsel analysis with the strong presumption that counsel was effective. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). To prove ineffective assistance, Kelly must show that counsel's deficient performance resulted in trial prejudice. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998).

Differences of opinion regarding trial strategy or tactics will not support a claim of ineffective assistance. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992). Counsel's decision of when or whether to object is a classic example of trial tactics. Only in egregious circumstances, on testimony central to the State's case, will counsel's failure to object constitute incompetence justifying reversal. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662, *review denied*, 113 Wn.2d 1002 (1989). Kelly's trial counsel's actions in this case do not require such reversal.

A. Testimony Regarding Drug Use, Drug Purchase, and Drug Culture

Kelly first asserts that his counsel was ineffective for failing to object to State evidence regarding his drug use, drug purchases, and participation in a drug culture. He argues that such evidence was inadmissible under ER 404(b). Kelly's argument is misguided.

Under ER 404(b), evidence of other crimes is not admissible unless relevant for another purpose such as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." But "[a] defendant cannot insulate himself by committing a string of connected offenses and then argue that the evidence of the other uncharged crimes is inadmissible because it shows the defendant's bad character, thus forcing the State to present a fragmented version of the events." *State v. Lillard*, 122 Wn. App. 422, 431, 93 P.3d 969 (2004), *review denied*, 154 Wn.2d 1002 (2005). Under the res gestae exception to ER 404(b), "evidence of other crimes or bad acts is admissible to complete the story of a crime or to provide the immediate context for events close in both time and place to the charged crime. *Lillard*, 122 Wn. App. at 432.

Here, evidence of Kelly's drug use, drug purchase, and his participation in a drug culture was necessary to provide the immediate context for events close in time and place to the charged crimes. *See Lillard*, 122 Wn. App. at 432. Kelly met Saldana-Williams at drug court, after which they proceeded to spend the day together purchasing and using methamphetamine. It was during this time that Saldana-Williams provided the list of Leisure Time members, including the Evas and Lykkens, from Gig Harbor. Thus, any objection would likely have been overruled. *See Lillard*, 122 Wn. App. at 432.

But even if the evidence was irrelevant, Kelly's trial counsel had a legitimate strategic or tactical reason not to object to evidence of Kelly's drug use, drug purchase, and participation in the drug culture. Kelly's defense was that, although he dabbled in the drug culture, he was not involved in the purported burglary ring. He maintained that his associates carried out the burglaries unbeknownst to him. Thus, there were tactical reasons not to object to the challenged evidence. Accordingly, that decision does not amount to ineffective assistance of counsel. *See Lord*, 117 Wn.2d at 883.

#### B. Testimony Regarding Experienced Burglars

Kelly also complains that his counsel's performance was deficient because his counsel repeatedly failed to object to the prosecutor's efforts to characterize Kelly as a skilled and accomplished burglar. Again, this argument is misguided.

Kelly's defense throughout trial was that he did not commit the burglaries and was not a part of a burglary ring. He maintained that his acquaintances from the drug culture perpetrated the crimes. Thus, there were tactical reasons not to object to testimony that law enforcement officers did not find fingerprints because skilled burglars, probably wearing gloves, committed the crimes.

Furthermore, Kelly fails to acknowledge that the State elicited the challenged testimony on redirect examination, in an attempt to rehabilitate the witness. Counsel may seek an additional explanation on redirect that is related to a subject area raised during cross-examination. *State v. Jones*, 26 Wn. App. 1, 8, 612 P.2d 404, *review denied*, 94 Wn.2d 1013 (1980). The purpose of redirect examination is to clarify matters that cross-examination may have confused and to rehabilitate the witness. *State v. Baker*, 4 Wn. App. 121, 128, 480 P.2d 778 (1971).

Here, the State elicited the challenged testimony in response to his trial counsel's impeachment of a Gig Harbor police officer. During cross-examination, Kelly's trial counsel attacked the officer's credibility when he repeatedly asked him why he may not have found fingerprints during his investigation of the Eva burglary. During redirect, the State sought to explain why the officer failed to find fingerprints. Thus, the trial court would likely have overruled any objection to the challenged evidence. *See Baker*, 4 Wn. App. at 128. Kelly has not shown that he was prejudiced by his trial counsel's failure to object to the officer's testimony that a skilled or experienced burglar likely committed the Eva burglary. *See Lord*, 117 Wn.2d at 883; *Baker*, 4 Wn. App. at 128.

#### C. Testimony Regarding Improper Relationship

Finally, Kelly complains that his trial counsel was ineffective because he failed to object to testimony that the State elicited from defense witness, Major Gerry King, implying that King and Kelly had an improper relationship. But Kelly's characterization of the State's cross-examination is misguided.

During the State's cross-examination of Major King, the State sought to expose his potential bias and credibility. Specifically, the State elicited testimony from Major King to clarify how he knew Kelly, how Kelly came to live with him, and to what extent Kelly was financially dependent on Major King. The State also elicited testimony that Major King had paid for attorneys to represent Kelly.

Contrary to Kelly's vague assertion, this testimony was relevant under ER 402 (evidence must be relevant to be admissible). The State sought to establish that Major King had both a financial and personal interest in the trial's outcome. Also contrary to Kelly's assertion, the

State’s impeachment of Major King—Kelly’s alibi witness—was not a comment on an “aberrant lifestyle.” *See* Br. of Appellant at 31. The State merely sought to undermine Major King’s credibility. The State’s cross-examination was proper and the trial court would likely have overruled any objection. *See Lord*, 117 Wn.2d at 883.

In sum, Kelly has failed to establish that his trial counsel’s performance was deficient for failing to object to testimony and various statements. *See Lord*, 117 Wn.2d at 883. We hold that Kelly was afforded the effective assistance of counsel during his trial. *Stenson*, 132 Wn.2d at 705.

## II. Prosecutorial Misconduct

Kelly next contends that the prosecutor committed misconduct “by repeatedly asking improper questions that were designed to elicit inadmissible evidence and also by making improper and unfairly prejudicial comments in closing argument.” Br. of Appellant at 32. We disagree.

In order to establish prosecutorial misconduct, Kelly must prove that the prosecutor’s conduct was improper and that it prejudiced his right to a fair trial. *State v. Carver*, 122 Wn. App. 300, 306, 93 P.3d 947 (2004). He can establish prejudice only if there is a substantial likelihood that the misconduct affected the jury’s verdict. *Carver*, 122 Wn. App. at 306. We review a prosecutor’s comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *Carver*, 122 Wn. App. at 306. In addition, a prosecutor’s improper remarks are not grounds for reversal if the defense counsel invited or provoked the comments; they are a pertinent reply to defense counsel’s arguments; and they are not so prejudicial that a curative instruction would be ineffective. *Carver*, 122 Wn. App. at 306 (citing *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994),

*cert. denied*, 514 U.S. 1129 (1995)).

The trial court must have the opportunity to correct any alleged error, and the defendant's failure to object at trial waives his right to challenge the remarks on appeal. *State v. Fullen*, 7 Wn. App. 369, 389, 499 P.2d 893, *review denied*, 81 Wn.2d 1006 (1972), *cert. denied*, 411 U.S. 985 (1973). Here, Kelly objected to the alleged errors, and, thus, preserved these issues for appeal.

#### A. Cross-Examination of Major King

Kelly first alleges that the prosecutor committed misconduct during cross-examination of Major King when he asked, "Did the fact that [Kelly] was staying at the jail give you any idea that he might be involved in criminal behavior?" 8 RP at 585. This argument fails.

Contrary to Kelly's assertion, the prosecutor's question did not violate ER 404(b). ER 404(b) only applies to prior misconduct offered as substantive evidence, not evidence offered for impeachment. *State v. Wilson*, 60 Wn. App. 887, 891-92, 808 P.2d 754, *review denied*, 117 Wn.2d 1010 (1991). When prior misconduct or acts are offered for the limited purpose of general impeachment, admissibility is governed by ER 607. 5 Karl B. Tegland, *Washington Practice: Evidence Law and Practice* § 404.15 (4th ed. 1999).

Here, during direct examination, Major King testified that he was starting to suspect that Kelly was involved in drugs but that he saw no signs of criminal activity. On cross-examination, the prosecutor clearly sought to impeach Major King's credibility when he asked if Kelly's recent incarceration had led Major King to believe Kelly may be involved in criminal activity. This was proper under ER 607 ("[t]he credibility of a witness may be attacked by any party, including the party calling the witness.").

And even if this question were improper, Kelly cannot establish that the question prejudiced him. *See Carver*, 122 Wn. App. at 306. At the close of the State's case, before Major King testified on behalf of Kelly, the trial court read to the jury an agreed stipulation, stating that Kelly had been incarcerated in Pierce County jail and released on August 28, 2003. Therefore, the jury already knew that Kelly had been in jail. The prosecutor's question cannot be categorized as misconduct requiring reversal. *Carver*, 122 Wn. App. at 306.

#### B. Closing Argument

Next, Kelly alleges that the prosecutor committed misconduct during closing arguments by suggesting that Kelly's blood was found on the visor of the Lykkens' Saturn and by appealing to the jury's emotions and passions. This argument also fails.

A prosecutor has wide latitude in drawing and expressing reasonable inferences from the evidence in closing argument. *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). There is no misconduct where the prosecutor argues based on the facts in evidence or suggests reasonable inferences from the evidence. *State v. Smith*, 104 Wn.2d 497, 510-11, 707 P.2d 1306 (1985). Moreover, reversal is not required if a curative instruction could have obviated the error. *Hoffman*, 116 Wn.2d at 93.

Here, the prosecutor's comments during closing argument, suggesting that it was Kelly's blood on the visor of the Lykkens' Saturn, were not improper when considered in the context of the case. At trial, the deputy testified that he observed blood on the visor of the vehicle. Lykken also testified that he observed what appeared to be blood on the driver's side visor of his Saturn. In addition, there was DNA evidence that the blood found on the Lykkens' scissors matched Kelly's DNA profile. Thus, when the prosecutor suggested that Kelly cut his finger on the

Lykkens' scissors and then drove the Lykkens' car from their residence, it was a reasonable inference based on the evidence. *See Smith*, 104 Wn.2d at 510-11. Furthermore, Kelly did not request a curative instruction based on the prosecutor's argument concerning the alleged blood on the Saturn's visor. Reversal is, therefore, not required. *See Hoffman*, 116 Wn.2d at 93.

Likewise, reversal is not required based on Kelly's argument that the prosecutor urged the jury to convict him by appealing to its passions and emotions. During closing, while explaining the firearm special verdict form, the prosecutor stated:

[Prosecutor]: And then, finally, the instruction says, and this is for the special verdict only: A person is armed with a firearm if at the time of the commission of the crime the firearm is easily accessible and readily available for offensive or defense purposes. Again, if Mr. Eva came home at one in the morning and caught Mr. Kelly in the process of burglarizing his house and Mr. Kelly had that gun in his hand --

[Defense Counsel]: Objection, Your Honor; now we're talking about robbery, and it just seems --

[Trial Court]: Well, overruled. We have to wind it up here . . . .

[Prosecutor]: I'll be done in a minute. If Mr. Eva had walked in on this burglary Mr. Kelly would have had his firearm in his hand, and we can all imagine what could have happened in that context, which is why special verdicts like this exists.

8 RP at 654-55.

Kelly contends that these comments were a deliberate appeal to the jury's emotion or passion, and thus improper. *see Russell*, 125 Wn.2d at 89; *State v. Belgarde*, 110 Wn.2d 504, 507-09, 755 P.2d 174 (1988). He relies on *Russell* and *Belgarde* to support this contention.

In *Belgarde*, the prosecutor characterized the defendant as belonging to "a deadly group of madmen" who were "butchers that kill indiscriminately," comparing them to well-known terrorist groups. *Belgarde*, 110 Wn.2d at 508. The *Belgarde* prosecutor also drew the jury's

attention to facts not in the evidence. *Belgarde*, 110 Wn.2d at 508. The Washington State Supreme Court reversed the conviction for first degree murder and ordered a retrial, holding that the misconduct was so flagrant and ill-intentioned that no instruction could cure it. *Belgarde*, 110 Wn.2d at 509, 510.

In *Russell*, the Supreme Court held that the prosecutor committed egregious misconduct by arguing that, if acquitted, the defendant would go to another community and begin killing again. *Russell*, 125 Wn.2d at 89. But the *Russell* court went on to hold that the prosecutor's misconduct was not so flagrant so as to warrant a new trial because Russell had not objected to the argument, the argument did not endanger repulsion, and the defense incorporated the statement into its own argument. *Russell*, 125 Wn.2d at 89.

Here, similar to *Russell*, the prosecutor's invitation for the jury to speculate as to what would have happened had Eva caught Kelly in the act of burglarizing his home, could be viewed as improper. *See Russell*, 125 Wn.2d at 89. But also similar to *Russell*, the prosecutor's misconduct was not so flagrant so as to warrant reversal. *See Russell*, 125 Wn.2d at 89. The prosecutor was not intentionally attempting to enflame the jury's passion and emotion. Rather, he was attempting to explain the distinctions between first degree burglary with a deadly weapon enhancement and a firearm special verdict form. Moreover, the defense counsel later incorporated the challenged argument into his own closing argument. Thus, Kelly has failed to establish that the prosecutor's closing argument prejudiced him. *See Russell*, 125 Wn.2d at 89.

### C. Sentencing

Finally, Kelly briefly argues that the prosecutor committed misconduct warranting reversal when he argued, at sentencing, facts of Kelly's prior convictions to seek an exceptional sentence.

This argument is unconvincing for several reasons.

First, Kelly fails to adequately brief this prosecutorial misconduct argument. He identifies prosecutorial misconduct as an issue for appellate review and generally cites the SRA, but he does not provide argument or citation to the record. Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration. *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992); *see also* RAP 10.3(a)(6) (providing that appellant’s brief should contain “[t]he argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record”). We decline to review this issue further.

Second, to establish that prosecutorial misconduct constituted a prejudicial error, an appellant must show that there is a substantial likelihood that the misconduct affected the jury’s verdict. *State v. Pirtle*, 127 Wn.2d 628, 653, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996); *Carver*, 122 Wn. App. at 306. Kelly cannot make this showing because the jury’s verdict was entered one month before sentencing. Therefore, there is no likelihood that the prosecutor’s sentencing comments affected the jury’s verdict. Thus, they do not amount to prosecutorial misconduct warranting reversal. *See Pirtle*, 127 Wn.2d at 653; *Carver*, 122 Wn. App. at 306.

Kelly has failed to establish any instance of prosecutorial misconduct warranting reversal of his convictions. *Pirtle*, 904 P.2d at 672; *Carver*, 122 Wn. App. at 306.

### III. Amending Information

Kelly next contends that the trial court erred when it allowed the State to amend the information at the end of its case because “the untimely amendment of the date of the alleged crime undermined [Kelly’s] alibi defense.” Br. of Appellant at 37. He maintains that the trial court abused its discretion by allowing the State to amend the information on the day of trial.

This argument lacks merit.

Under CrR 2.1(d), a trial court may permit the State to amend an information if it does not prejudice the defendant's substantial rights. The defendant bears the burden of demonstrating prejudice. *State v. Gosser*, 33 Wn. App. 428, 435, 656 P.2d 514 (1982). It is within the trial court's discretion to address such amendments. *Gosser*, 33 Wn. App. at 435.

The charging date in an information is usually not a material element of the crime. *State v. DeBolt*, 61 Wn. App. 58, 61-62, 808 P.2d 794 (1991). Thus, amending the date is a matter of form rather than substance and is allowed absent an alibi defense or a showing of other substantial prejudice to the defendant. *State v. Allyn*, 40 Wn. App. 27, 35, 696 P.2d 45, *review denied*, 103 Wn.2d 1039 (1985); *State v. Fischer*, 40 Wn. App. 506, 510-12, 699 P.2d 249, *review denied*, 104 Wn.2d 1004 (1985). That a defendant does not request a continuance is persuasive of lack of surprise and prejudice. *Gosser*, 33 Wn. App. at 435.

Kelly complains that he was prejudiced because when the State changed the charging period during trial, it undermined his alibi defense. But Kelly misconstrues the facts. On November 6, 2006, at the end of its case, the State did not extend or alter the charging period. The amendment shortened the charging period on counts V, XIV, XV, and XVI, relating to the Lykken burglary. As a result, all counts relating to the Lykken burglary—counts V, VII, VIII, XIV, XV, and XVI—had a charging date between August 28, 2003 and September 4, 2003. Amending the information during trial was merely technical. *Baker*, 48 Wn. App. at 225.

Furthermore, Kelly fails to identify any evidence in the record showing that the November 6, 2006 information amendment surprised or misled him. *See Gosser*, 33 Wn. App. at 435. On October 30, 2006, Kelly acknowledged that the State filed the second amended information

months before trial, amending the first date of the charging period on the counts relating to the Lykken burglary from August 27, 2003 to August 28, 2003. In fact, the State filed the second amended information on June 7, 2006. Kelly therefore had over four months to prepare for trial, knowing that the State would seek to establish that Kelly burglarized the Lykken residence on August 28, 2003. And significantly, Kelly failed to request a continuance when the State moved to amend the charging period.

Kelly has failed to establish that he the trial court's decision to amend the charging period at the end of the State's case prejudiced him. *See Grosser*, 33 Wn. App. at 435. There was no abuse of discretion.

#### IV. Admissibility of Photographs

Kelly contends that the trial court erred when it admitted photographic evidence purporting to show him using one of the Evas' stolen credit cards at a convenience store. He argues that the evidence was inadmissible under ER 403 because it misled the jury. This argument fails.

A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial. *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986). Here, Kelly did not object to the admission of the photographs on ER 403 grounds.<sup>4</sup> He thus failed to preserve this error for appeal. *See Guloy*, 104 Wn.2d at 422. We need not review this error on appeal.

#### V. Missing Witness Instruction

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<sup>4</sup> Kelly objected, arguing that the State failed to lay sufficient foundation for the admission of the photographs. He does not appeal the trial court's ruling that the State sufficiently laid foundation.

Kelly next contends that the trial court erred when it denied his request for a missing witness jury instruction. He maintains that he was entitled to the instruction because one of the Lykkens' neighbors, Deborah Roberts, had allegedly contacted the authorities to report that the Lykkens' burglar alarm had gone off at approximately 2:30 am on August 28, 2003.

We review a trial court's refusal to give a requested instruction for abuse of discretion. *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997). It is error to give an instruction that the evidence does not support. *Hoffman*, 116 Wn.2d at 111.

"A party's failure to produce a particular witness who would ordinarily . . . testify raises the inference in certain circumstances that the witness's testimony would have been unfavorable." *State v. McGhee*, 57 Wn. App. 457, 462-63, 788 P.2d 603, *review denied*, 115 Wn.2d 1013 (1990). To invoke the missing witness rule and obtain an instruction in a criminal case, the defendant is not required to prove that the State deliberately suppressed unfavorable evidence. *McGhee*, 57 Wn. App. at 463. Rather, the defendant must establish circumstances indicating that the State would not knowingly fail to call the witness unless the witness's testimony would be damaging. *State v. Davis*, 73 Wn.2d 271, 280, 438 P.2d 185 (1968). No such inference arises if the State provides a satisfactory explanation for the absence of the missing witness. *State v. Blair*, 117 Wn.2d 479, 489, 816 P.2d 718 (1991).

In addition, a missing witness instruction is appropriate only when the uncalled witness is "peculiarly available" to one of the parties. *Davis*, 73 Wn.2d at 276. For a witness to be "peculiarly available" to one party, there must have been a community interest between the party and the witness, or the party must have such a superior opportunity for knowledge of a witness

that there was a reasonable probability that the witness would have been called to testify for the party except that the testimony would have been damaging. *Davis*, 73 Wn.2d at 277.

Here, the trial court rejected Kelly's proposed missing witness instruction because Deborah Roberts was not peculiarly available to the State. Indeed, the trial court's ruling was proper. The State had provided Roberts's name and contact information to the defense before trial. Kelly, therefore, had just as much access to Roberts as the State did. Roberts was simply not peculiarly available to the State. *See McGhee*, 57 Wn. App. at 462-63.

Additionally, based on the record, it is unclear whether Roberts would have been able to provide any substantive testimony about the Lykken burglary, let alone damaging testimony to the State's case. Kelly elicited testimony from Detective Busey that he received an e-mail from a Pierce County Sheriff's Department deputy, informing a neighbor, presumably Roberts, that the Lykkens' alarm went off at 2:30 am on August 28, 2003. The ultimate source of this information was not clear. It was merely speculative.

Kelly has failed to establish that the State had any reason to knowingly fail to call Roberts as a witness. *See Davis*, 73 Wn.2d at 277, 280. Likewise, Kelly has failed to establish that Roberts was peculiarly available to the State. *See Davis*, 73 Wn.2d at 276. Therefore, we hold that the trial court did not abuse its discretion when it denied Kelly's proposed missing witness instruction. *See McGhee*, 57 Wn. App. at 463.

## VI. Sufficient Evidence

Kelly contends that the State failed to present sufficient evidence to prove beyond a reasonable doubt that he was guilty of two counts of first degree burglary. Specifically, he argues that the State failed to present sufficient evidence to establish that Kelly was at the scene of either

burglary. This argument lacks merit.

Sufficient evidence to support a conviction exists if any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt when viewing the evidence in the light most favorable to the State. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). An appellant claiming insufficiency of the evidence admits the truth of the State's evidence and all inferences that may reasonably be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We view both circumstantial and direct evidence as equally reliable, and defers to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence. *Thomas*, 150 Wn.2d at 874.

A person commits the first degree burglary when he: (1) enters or remains in a building unlawfully; (2) with intent to commit a crime; and (3) assaults any person or is armed with a deadly weapon. RCW 9A.52.020(1). In this case, the State presented sufficient evidence to establish Kelly committed both the Lykken and Eva burglaries.

The State produced evidence that Saldana-Williams accessed Leisure Time's database to provide Kelly with Leisure Time members' names from Gig Harbor, their home addresses, and the dates they were vacationing at Leisure Time properties. Both the Lykkens and the Evas were on the list, and Saldana-Williams testified that she gave a copy of that list to Kelly.

The State alleged that the Lykkens were burglarized between August 28, 2003 and September 4, 2003, while they were vacationing at a Leisure Time property. The burglar took two vehicles from the Lykken residence, one of which was later recovered with what appeared to be blood stains on the driver's side visor and steering column. The burglar also stole an operable rifle and an operable shotgun from the Lykken residence, along with shells. The burglar used a

pair of the Lykkens' scissors to disable the audible alarm system. Officers found blood on the scissors, and DNA testing revealed the blood was Kelly's. Also found in the Lykkens' car was a black leather jacket, Toshiba laptop, and pistol, stolen from the Evas' residence.

The State also alleged that the Evas were burglarized on September 5, 2003, by Spaulding and an accomplice. Spaulding and Kelly were both acquainted with Saldana-Williams. From the Eva residence, the burglar took credit cards, financial documents, a Toshiba laptop, a leather jacket, and an operable pistol with a full clip. Again, the Toshiba laptop, leather jacket, and pistol were recovered from the Lykkens' car. Additionally, the State presented video surveillance evidence of Kelly purportedly using one of the Evas' stolen credit cards at a convenience store on September 5, 2003 at 9:40 am. During an interview with Detective Busey, Kelly admitted that he was the person in the photograph.

Drawing all reasonable inferences in the light most favorable to the State, a rational trier of fact could find Kelly guilty of first degree burglary of the Lykken residence and the Eva residence. *See Thomas*, 150 Wn.2d at 821. There was sufficient evidence to support Kelly's burglary convictions. *See Thomas*, 150 Wn.2d at 874; *Salinas*, 119 Wn.2d at 201.

#### VII. Exceptional Sentence

Kelly insists that the sentencing court erred when it imposed an exceptional sentence for crimes committed in 2003 based on the 2006 sentencing guidelines. The State concedes, maintaining that we should vacate Kelly's sentence and remand for resentencing under RCW 9.94A.737 and RCW 9.94A.535. Accordingly, we vacate Kelly's sentence and remand for resentencing under the appropriate statutory authority.

#### VIII. Cumulative Error

Finally, Kelly contends that cumulative errors denied him a fair trial. Br. of Appellant at 45. The cumulative error doctrine applies to instances where there have been several trial errors that, standing alone, may not be sufficient to justify reversal but when combined may deny a defendant a fundamentally fair trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Finding only one error—the exceptional sentencing error—we hold that Kelly was not denied a fair trial under the cumulative error doctrine. His argument fails.

#### IX. Statement of Additional Grounds (SAG)<sup>5</sup>

Kelly raises two grounds for relief that relate to matters of credibility and weight.<sup>6</sup> An appellate court cannot review weight and credibility issues. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). We therefore decline to reach Kelly’s SAG issues.

Affirmed, but we vacate the sentence and remand for resentencing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

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Bridgewater, J.

We concur:

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Armstrong, J.

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<sup>5</sup> RAP 10.10.

<sup>6</sup> Kelly challenges Saldana-Williams’s testimony supporting the State’s theory that he broke into the Lykkens’ home. In addition, he argues that the scissors presented at trial with blood found on them were not the scissors that were recovered from the Lykkens’ house.

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Penoyar, A.C.J.